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No. 04-718

IN THE

Supreme Court of the United States

GEORGE A. WILLIAMS,
MICHAEL A. PERRYMAN, *et al.*,

Petitioners,

v.

CONSOLIDATED CITY OF JACKSONVILLE,
RAYFIELD ALFRED, Fire Chief,
in his individual and official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

This Court should deny the writ for two reasons. First, Petitioner has not demonstrated that the Eleventh Circuit's decision is erroneous. Second, Petitioner has not demonstrated any basis for conflict between the Eleventh Circuit's decision and this Court's precedents or those of other circuits.

I. Petitioners Did Not Present, As Claimed, A Case Of Intentional Illegal Racial Discrimination

Promotion to the position of Rescue Captain within the Jacksonville Fire Department is made from an eligibility list based upon a race-neutral written examination, with candidates ranked solely on the basis of their grade on the examination, as mandated by the City's contract with the firefighters union. *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1264-1265 (11th Cir. 2003). Each eligibility list is valid for a period of two years after which a new test is given and a new list is established. *Id.* The list in question was established on October 14, 1997 and expired two years thereafter. 341 F.3d 1265 n.4. During the two year period eight individuals, all white, had been promoted, in accordance with their ranking, as vacancies in the position of Rescue Captain arose. 341 F.3d 1265 n.5. In October 1999, nine days before the list expired, Thomas McCrone, Chief of the Rescue Division, presented to Fire Department Chief Ray Alfred, in a meeting at which only the two were present, a request that four new Rescue Captain positions be created within the ensuing nine days, so that the next four rescue lieutenants on the promotional list, numbers 9 through 12, the Petitioners, could be promoted prior to the list's expiration nine days later. 341 F.3d 1265. Petitioners are each white. *Id.*

The sum of the evidence that Fire Chief Ray Alfred discriminated illegally on the basis of race rests on a telephone conversation which occurred between Rescue Division Chief McCrone and Petitioner Price a short time after McCrone's meeting with Fire Chief Ray Alfred.[1] According to McCrone, as related by Petitioner Price, "Alfred said the next four people on the list do not reflect the diversity of the fire department." 341 F.3d n.8. Price responded to McCrone, "So basically you're not doing this because we're not black?" *Id.* McCrone answered, "Basically." *Id.*

While the statement made by Chief Alfred, as quoted by McCrone, that "the next four people on the list do not reflect the diversity of the fire department" is clearly admissible against Fire Chief Alfred in his personal capacity,[2] the capacity at issue in determining whether he can be held personally liable, the second statement made by McCrone in response to Petitioner Price' question is not. Price' question, "So basically you're not doing this because we're not black," to which McCrone answered, "Basically," is at best a reasoned conclusion that reflects McCrone's own thinking, and at worst is speculation. Either way, however, it is not admissible against Chief Alfred personally on the issue of qualified immunity under Fed. R. Ev. 403.[3]

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1. For purposes of this appeal of the district court's denial of qualified immunity to Chief Alfred on summary judgment, the facts are construed "in the light most favorable to the plaintiff[s]," *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002), and may not be the 'actual' facts of the case," *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000).

2. Fed. R. Ev. 105 allows the admission of evidence for a limited purpose.

3. Price' question and McCrone's answer would, however, clearly be admissible against the City, which is also a defendant in the case, since McCrone was in a managerial position. Fed. R. Ev. 801(d)(2)(A).

Absent this inadmissible statement, for purposes of the qualified immunity determination only, Petitioners are left solely with the statement that "the next four people on the list do not reflect the diversity of the fire department" as the predicate for concluding that Chief Alfred intentionally discriminated on the basis of race. This is a weak reed upon which to rely to establish the proposition that Chief Alfred engaged in racial discrimination, especially with McCrone's inadmissible speculation omitted.

Significantly, the rejection of McCrone's request by Chief Alfred did not necessarily mean the Petitioners would not ultimately be promoted to the next Captain's position vacancies, when they arose, or that Chief Alfred would be able to determine who did fill the vacancies. Instead, that would be determined by the results of the next Captain's examination, in which Petitioners, along with others, would be able to compete and be ranked, based on their test scores.

The word "diversity", in the context utilized by Chief Alfred, simply does not equate to illegal racial discrimination as claimed by Petitioners. *See*, *for example*, the discussion in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), wherein the Court held that the University of Michigan Law School has a compelling interest in attaining a diverse student body, and discussed "diversity" at great length, albeit not in an employment context. Moreover, for the reason set forth in Argument III below, a discussion of diversity may legitimately arise in the context of considering organizational changes in the workplace. Accordingly, these facts do not present, as claimed, a case of intentional racial discrimination.

II. There Is No Persuasive Basis For Granting Certiorari

Petitioners' first argument is that the Eleventh Circuit ignored applicable precedents of this Court and lower federal courts in reversing the District Court's denial of qualified immunity in this case involving a soon-to-expire promotion list.

The Petitioners claim that the Eleventh Circuit's opinion conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002) as well as other federal appellate decisions. The Eleventh Circuit's decision, however, raises no meaningful issue of importance for this Court's review based on conflict or otherwise. *Braxton v. United States*, 500 U.S. 344 (1991) ("A principal purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Indeed, the Eleventh Circuit specifically addressed the applicability of *Hope* and noted the important distinction, between creating jobs nine days before the candidates' list expires that would favor existing applicants of a certain race (white), and refusing to fill an existing position based solely upon the race of the qualified applicant. *Williams*, 341 F.3d at 1272-73. Rule 10 of the Court's rules states that a petition for certiorari "is rarely granted" when the asserted error consists of the misapplication of a properly stated rule of law. Petitioners have asserted nothing more here. Certiorari accordingly, should be denied.

III. Established Precedent Of This Court And The 11th Circuit Required The Fire Chief To Consider The Disparate Impact On Racial Minorities That Would Have Resulted Had He Created Four New Positions Nine Days Before The Candidates' List Was To Expire

Unrefuted evidence, in the form of testimony by an expert witness[4] was presented in the District Court that creating four new high ranking positions in a rush, with the promotional list about to expire, with the specific knowledge that all four individuals to be promoted were white, given the absence of business necessity for proceeding in this manner, would constitute an illegal employment practice under Title VII because of the resulting disparate impact on minorities in the Fire and Rescue Department.[5] Disparate impact theory prohibits neutral employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily protected group. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). 42 U.S.C. § 2000e-2(k), **Burden of proof in disparate impact cases**, reads in part as follows:

> (1) (A) An unlawful employment practice based on disparate impact is established under this title only if —
>
> > (I) a complaining party demonstrates that a respondent uses a particular employment

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5. *See* Document 80, District Court docket, Exhibit L, pp. 4, 50, 79-82.

> practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

This statute is a codification of what the Eleventh Circuit describes as "settled jurisprudence" related to disparate impact methodology. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000). Significantly, the duty to adhere to this law is present for and applicable to all covered employers, *irrespective* whether or not they happen to have an affirmative action plan in place.

Complying with the nondiscrimination provisions of Title VII requires a disparate impact analysis to determine what impact the questioned employment practice has on the "diversity" of the work force, thus making a diversity inquiry necessary prior to simply saying "yes" to the creation of new positions under the circumstances presented. *See EEOC v. Joe's Stone Crab, Inc.* 220 F.3d at 274-278. Fire Chief Ray Alfred obviously must be assumed constructively to have knowledge of this law in the same manner he is said to be legally on notice of the Eleventh Circuit's decisions in *Yeldell* and other cases. For this reason, Fire Chief Ray Alfred's statement that "the next four people on the list do not reflect the diversity of the fire department" do not necessarily constitute evidence of an illegal discriminatory action, but rather may represent evidence of an entirely legal action — ensuring that his Department does not implement an illegal employment practice. Pursuant to this reasoning, Chief Alfred's conduct in this case was surely not a "clearly established" violation of law.

In summary, Title VII disparate impact theory has been the law for many years and must be followed, even in absence of an affirmative action plan. Adhering to it requires management to engage in diversity analyses relative to employment practices such as whether and when four new high ranking positions should be created, as in the circumstances of this case. There was no Eleventh Circuit case law in place, or other "clearly established" law, which indicated that engaging in a disparate impact inquiry in the circumstances of this case was illegal.[6]

IV. The *Yeldell* Decision Did Not "Clearly Establish" Law That Governed This Case

Petitioners contend that the case of *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11th Cir. 1992) provided "clearly established law" which put Fire Chief Ray Alfred on notice that he could not decline to create four new Captain's positions for Petitioners in the circumstances of this case. The Eleventh Circuit correctly rejected this argument, concluding that Chief Alfred did not make a decision concerning already existing positions, as in *Yeldell*, but rather was deciding whether to *create* four new permanent high level positions, as proposed by a subordinate, a significant distinction. 341 F.3d at 1272.

In *Yeldell* two personnel decisions made by Health and Human Services Commissioner Reuben Davis, an elected black official, with respect to two individuals, Karen Cremer, and Russell Starkey, were at issue. Karan Cremer, a white

6. The District Court rejected disparate impact law as a defense in denying summary judgment in the case. See Document 114, District Court Docket, p. 15. The Court of Appeals did not address this issue, even though it was raised in Ray Alfred's briefs on appeal.

woman held the position of Acting Supervisor for Maternal/ Infant Care at Cooper Green Hospital (apparently having been given that title when the position became vacant). 956 F.2d at 1064-65. Recruiting for a person to be permanent (rather than "Acting") Supervisor was suspended ("temporarily frozen") by Commissioner Davis, allegedly for monetary reasons, until a suitable black applicant for the job, Ms. Bone, was found. *Id.* Ms. Bone, though less qualified, was given the job, the alleged monetary barrier somehow disappearing. *Id.*

Russell Starkey, a white man, had worked for Green Cooper Hospital for three years as an independent contractor doing the work of a Credit and Collections Manager. 956 F.2d at 1065. Commissioner Davis decided not to renegotiate Starkey's contract, instead creating a position on the hospital's staff called Credit and Collections Supervisor. *Id.* Davis opened the new job only to applicants who held 4 year degrees. *Id.* Starkey did not, and the job was given to a black individual who had a 4 year degree. *Id.*

Both the Cremer and Starkey scenarios differ from the facts or scenario in this case in several key respects. Most significantly they both involved a job or position that already existed. The Nursing Supervisor's job held by Cremer in an Acting capacity already existed, but was rendered temporarily unavailable through alleged trick or scheme. The Credit and Collections Manager's job held by Starkey already existed also and was converted by alleged trick or scheme to a position having a different status, with an alleged bogus job qualification which rendered Starkey not eligible to compete for it.

The situation in this case differs markedly from that in *Yeldell*. First, there were no vacancies in existence to be promoted to — period. Chief Alfred was asked to create four new "roving" Captain's positions shortly (9 days) before the Captain's promotional list expired. Document 73, District Court Docket, pp. 8, 39. Chief Alfred declined to create four new "roving" Captain jobs that hadn't previously existed because the next four people on the list did not reflect the "diversity of the fire department." Second, and unlike Rueben Davis in *Yeldell*, Chief Alfred would not be able to select the identity or race of the next candidates to be promoted when vacancies again arose. This is because of the race neutral test which all candidates for Rescue Captain took to be promoted, with the test score, exclusively, determining who was promoted. Indeed, Petitioners themselves had the option to again take the test and could still have been the next candidates promoted, when vacancies arose, if they ranked 1 through 4 in the test results. The holding in *Yeldell* does not extend this far and does not cover this situation, but rather involves blatant selection of an individual of a different race.

The test to be applied to these circumstances has been reformulated since the *Yeldell* case was decided. In *Yeldell* the analytical questions were: first, whether the laws allegedly violated were clearly established at the time of the defendant's acts; second, whether the plaintiff had presented evidence sufficient to create a genuine issue of fact as to whether the defendant had engaged in conduct violative of that clearly established law. *Yeldell*, 956 F.2d at 1064.

Now, "'[t]he threshold inquiry a court must undertake . . . is whether [the] plaintiff's allegations, if true, establish a constitutional [or statutory] violation'." *Vineyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002), *quoting Hope v. Pelzer*,

536 U.S. 730, 736 (2002). If the answer to this question is in the affirmative, "the next sequential step is to ask whether the right was clearly established." *Vineyard*, 311 F.3d at 1346, *citing Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The Eleventh Circuit clearly was correct in concluding that no "clearly established" law governed Fire Chief Ray Alfred's alleged conduct in October 1999. The fact that the present case distinctly involves creating new positions is a far leap from the facts in *Yeldell.*

CONCLUSION

The Court should deny certiorari in this case. There is no conflict between the rulings of separate courts of appeals which would justify review by the Court. The Eleventh Circuit's ruling in this case was correct and should not be disturbed. Indeed, Petitioners assert only that the Eleventh Circuit has misapplied the holding in *Hope v. Pelzer*, a situation in which, pursuant to Rule 10, if that were the case, certiorari "is rarely granted".

The alleged facts in this case do not constitute a "clearly established" violation of law. Considering "diversity" in determining not to create four new high level positions during a narrow time frame when requested by a subordinate was not clearly illegal, because established disparate impact law required that such an analysis be made. This in itself served to make any relevant law purporting to prohibit such conduct singularly unclear. Second, and independently, *Yeldell* differed from the instant case in that it involved existing positions, not new positions, and in that when vacancies arose, they would be filled in a non-discriminatory manner. These circumstances establish not only that the Eleventh

Circuit was correct on the merits, but also that this case should not be placed on this Court's docket. Certiorari should accordingly be denied.

Respectfully submitted,

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